Supreme Court of the United States

October Term, 1971

No. 71-573

MELVIN LAIRD, SECRETARY OF DEFENSE, ROBERT SEAMANS, JR., SECRETARY OF THE AIR FORCE, AND UNITED STATES OF AMERICA,
Petitioners,

v.

JIM NICK NELMS, LETTIE BAKER NELMS and LONNIE RAY NELMS

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

GEO. E. ALLEN
Counsel for Respondents

ALLEN, ALLEN, ALLEN & ALLEN
1809 Staples Mill Road
Richmond, Virginia 23230

TABLE OF CONTENTS

Supreme Court of the United States

October Term, 1971

No. 71-573

MELVIN LAIRD, SECRETARY OF DEFENSE, ROBERT SEAMANS, JR., SECRETARY OF THE AIR FORCE, AND UNITED STATES OF AMERICA,
Petitioners,

v.

JIM NICK NELMS, LETTIE BAKER NELMS and LONNIE RAY NELMS

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

SUMMARY OF ARGUMENT

1. Reliance upon Dalehite, 346 U.S. 15, 73 S.Ct. 56 (the Texas City case) is misplaced because there was no local law in that case imposing liability when damages result from dangerous activity from which harm would necessarily result despite all precautionary measures.

2. Should the Court hold that the discretionary function provision of the Federal Tort Claims Act is applicable;

nevertheless, the case should be remanded to afford respondents an opportunity to bring the case within the provisions of the Fifth Amendment to the Constitution prohibiting the taking of private property for public uses without just compensation.

3. Relevant Constitutional and Statutory Provisions

(a) 28 U.S.C.A. § 1346(b), Appendix page 1

(b) 28 U.S.C.A. § 2680, Appendix page 2

(c) Constitution of the United States, Amendment V, Appendix page 1

(d) Constitution of North Carolina, Article 1, § 17, Appendix page 1

(e) Bill of Rights, Article 1, § 35, Constitution of North Carolina, Appendix page 2

(f) General Statutes of North Carolina, Volume 2C, Replacement 1965, § 63-11, Appendix page 2

(g) § 63-12 of North Carolina Statutes, Appendix page 2

(h) § 63-13 of North Carolina Statutes, Appendix pages 2-3.

CITATIONS *Page*

ARGUMENT

1. Reliance Upon Dalehite, 346 U.S. 15, 73 S.Ct. 956, (The Texas City Cases) Is Misplaced.

While the Court held in *Dalehite* by a four to three decision that acts of the Government in formulating a plan for manufacture of fertilizer and in carrying it out were under the circumstances acts of discretion and no liability of the Government resulted, nevertheless, the Court also held, Point 20 of the Headnotes, in 73 S.Ct.:

> "Where the doctrine of absolute liability is applicable, such liability is imposed automatically when any

damages are sustained as result of decision to engage in the dangerous activity, and degree of care used in performance of the activity is irrelevant."

Interpretation has vastly enlarged the sphere of responsibility of the Government since the *Dalehite* case.[1] These cases seem to answer Mr. Justice Jackson's sarcastic comment in his dissent in *Dalehite,* that "The ancient and discredited doctrine that the king can do no wrong has not been uprooted; it has merely been amended to read The King can do only little wrongs. . . ."

The question of absolute liability under local law was not before the Court in *Dalehite.* No local statutes were involved. The Federal Tort Claims Act expressly provides for liability on the part of the Government for injuries "caused by the negligent or wrongful act or omission of any employee of the Government while acting within scope of his office or employment under circumstances where the United States if a private person, would be liable to the claimant *in accordance with the law of the place where the act or omission occurred."* (28 U.S.C. 1346(b) Emphasis supplied.)

In *U.S.* v. *Praylou,* 208 F.2d 291 (C.A. 4) certiorari denied, the Court, holding that the Government was strictly liable to the plaintiffs, pointed out that South Carolina, the state in which the accident occurred, had adopted the uniform Aeronautics Act which imposed liability without fault on the operators of aircraft for damages resulting from

---

[1] *Indian Towing Co.* v. *United States,* 350 U.S. 61, 76 S.Ct. 122 (1955); *Rayonier* v. *United States,* 352 U.S. 315, 77 S.Ct. 374 (1957); *Exchange Bank of Madison, Wis.* v. *United States,* 257 F.2d 938 (7 C.C.A. 1958); *United States* v. *Alexander,* 238 F.2d 314 (5 C.C.A. 1956); *Dalstrom* v. *United States,* 228 F.2d 819 (C.C.C. 1956): *McCormick* v. *United States,* 159 F. Supp. 920 (Minn. 1958).

such operations. North Carolina has also adopted the Uniform Aeronautics Act with statutes even stronger than the South Carolina statutes.[2] Said the Fourth Circuit in *Praylou:*

> "Congress did not intend to exclude from coverage of Federal Tort Claims Act liability arising from operation of government aircraft merely because under state law liability for injury was made absolute and not dependent upon negligence, nor did Congress intend that there should be liability in states where liability under state law is based on negligence and no liability in great majority of states which have adopted Uniform Aeronautics Act. Code S.C. 1952, §§ 2-1 et seq., 2-6; 28 U.S.C.A. §§ 1346(b), 2674." (208 F.2d at pp. 291-2)

It should be noted that the language of the statute is "injuries caused by the negligence or wrongful act" etc. If any act which violates a statute enacted for the benefit of the individual is not a wrongful act when the individual suffers damages as a result thereof, then what is a wrongful act? No citation of authority is required to show that a violation of such a statute is a wrongful act. Indeed, many violations of statutory enactments are made criminal offenses and persons are prosecuted and punished for violating them. And it is universally true that the violation of a statute constitutes negligence as a matter of law. Before the Federal Tort Claims Act was enacted, this Court held in *U.S.* v. *Causby,* 328 U.S. 256, 66 S.Ct. 1962, that the Government was liable under the Fifth Amendment of the Constitution for an alleged taking by the Government of plaintiff's home and chicken farm which was adjacent to a municipal airport leased to the Government. As many as

---

[2] See Appendix.

150 chickens were killed when they flew into the walls from fright. The value of the property was significantly depreciated. It was held that the result of the Government's activity was the destruction of the use of the property as a commercial chicken farm and that these facts were sufficient to constitute a taking under the Fifth Amendment. The Court there relied upon the same North Carolina law that we rely upon here. Point 8 of the Headnotes, page 1063 of 66 S.Ct. reads:

> "A holding that flights by airplanes at low levels over plaintiffs' land, which adjoined municipal airport in North Carolina leased by federal Government, deprived plaintiffs of use and enjoyment of their land and constituted a 'taking' so as to entitle them to just compensation, was not inconsistent with local law of North Carolina governing landowner's claim to immediate reaches of the superadjacent airspace. G.S.N.C. §§ 63-11 to 63-13; U.S.C.A. Const. Amend. 5."

In *Palisades Citizens Association, Inc.* v. *Civil Aeronautics Board and Washington Airways,* 420 F.2d 188, Judge Tamm, speaking for the Court said:

> ". . . where that invasion is destructive of the landowner's right to possess and use his land, it is compensable either through private tort actions or under the fifth amendment where the use, by the government, amounts to a 'taking.' " (Citing *U.S.* v. *Causby*)

Judge Butzner distinglished the instant case from the *Dalehite* case upon the ground that the likelihood of harm was too remote to render the Government liable for the fertilizer explosion. "There must be knowledge of a danger, not merely possible, but probable. *MacPherson* v. *Buick Motor Co.,* 217 N.Y. 382, 389, 111 N.E. 1050." He continues:

"The unforeseeability of harm in the Texas City explosion contrasted with the likelihood of harm from sonic booms raises a distinction so significant that *Dalehite* cannot be considered to control the case before us. By its reliance on the quoted language in *MacPherson*, the Court indicated that the exception is inapplicable when the government knows harm is probable. There is an obvious difference between the unencumbered right to make decisions for the general welfare and the unrestricted power to disregard predictable danger to the public at large. Here the release of a destructive force—a sonic boom—was deliberately planned, and the likelihood of harm to some civilians was known to exist despite all precautionary measures the planners could take. These factors, not found in *Dalehite,* make that case inapplicable. The inability to prevent a deliberately released destructive force from causing harm, it seems to us, provides an appropriate limit to the discretionary function exception." (442 F.2d at page 1167)

This seems to be the theory of the Department of the Air Force. The regulation issued October 6, 1967, Clerk's Record, page 31, states at page 33 of the Clerk's Record, page 3 of the Regulation:

"When a civilian area has been affected by Air Force aircraft, the Air Force must accept responsibility for restitution and payment of just claims."

This practice is followed by the Air Force, according to a well written article in the Journal of Air Law and Commerce, Vol. 32, pages 597 to 606, published by the Southern Methodist Law School.

Judge Butzner, page 1169 of 442 F.2d, refers to the Air Force's regulations. We quote:

> "But in this case, we can rely on the Air Force's own assessment of the potential for harm from sonic booms. Air Force Regulation 55-34 provides a satisfactory basis to meet the requirements of § 520 of the Restatement. In paragraph 3 it orders maximum protection to be afforded civilian communities. In paragraph 4 it says that damage may nonetheless occur. The regulation, therefore, is a frank admission that the potential for destructiveness from sonic booms is a continual risk of supersonic flight. Since the Air Force is in the best position to affirm that, despite the utmost care, sonic booms pose a substantial risk to the property of others, it should not be permitted to prove otherwise."

The theory of absolute liability was apparently assumed by Captain Robert J. Rottman, Hq. MATS and Captain Richard W. Phillips, Hq. MATS, in their article, "The Sonic Boom Problem---One Judge Advocate Office Solution," JAG Bul. March-April 62, Vol. IV, No. 2, pages 1015. Captain Rottman is a graduate of the University of St. Louis and a member of the Missouri bar, and Captain Phillips is a graduate of the University of Miami, and a member of the Florida bar.

These men were stationed at Scott Air Force Base, Illinois. They say (pages 10 and 11):

> "This article will attempt to enumerate the means that we at Scott have utilized to solve our sonic boom problem in the Staff Judge Advocate Office. We are reporting it in this manner in the hope that our experiences can be of benefit to other Staff Judge Advocates who are confronted with a multitude of complaints and claims that may arise due to sonic boom activities in their area. These solutions and methods are the products of trial and error and are what ultimately we considered in our best judgment to be the means of solving the problem."

2. In The Event This Court Should Hold That The Discretionary Function Provision Of The Federal Tort Claims Act Is Applicable To The Officers And Agents Of The Government Planning And Conducting The Flights Causing The Damage Complained Of; Nevertheless, Respondents Would Be Entitled To A Trial Under The Provisions Of The Fifth Amendment To The Constitution Provided They Can Bring Their Case Within The Ruling In Causby.

As Judge Tamm said in *Palisades Citizens Association, Inc.*:

> "Where that invasion is destructive of the landowner's right to possess and use land, it is compensable either through private tort actions or under the Fifth Amendment where the use, by the Government, amounts to a taking." (Citing *Causby*)

The Court of Appeals said on this subject:

> "Nelms also claims that he has a constitutional right to recovery because his property has been taken without just compensation. Nelms did not press his constitutional claim in the district court, though his complaint, broadly read, is sufficient to embrace it. The district judge understandingly dealt only with Nelms' cause of action under the Federal Tort Claims Act. Nelms' pleading and proof present a record too sketchy for initial consideration of this important constitutional question in an appellate court.
>
> "The summary judgment entered by the district court is vacated, and this case is remanded for trial. With regard to the cause of action based on the Federal Tort Claims Act, the sole issue to be tried is whether sonic booms damaged Nelms' home, and, if so, the extent of the damage. Nelms also should be allowed to amend his complaint to plead more specifically his cause of action based on the Fifth Amendment. On this issue, Nelms must establish that the damage, if any, to his

home amounted to a taking of his property without just compensation." (442 F.2d at page 1169)

So, in any event, the case should be remanded to the trial court to be tried either under the Tort Claims Act or under the Fifth Amendment to the Constitution or under both.

CONCLUSION

It is respectfully submitted with deference, and yet with a firm conviction, that the Fourth Circuit has achieved a sound result correct both under the North Carolina law where the acts complained of occurred, and Federal law. Certiorari should be denied.

Respectfully submitted,

GEO. E. ALLEN
Of Counsel

ALLEN, ALLEN, ALLEN AND ALLEN
1809 Staples Mill Road
Richmond, Virginia 23230
Counsel for Respondents

CERTIFICATE OF SERVICE

I, Geo. E. Allen, attorney for respondents, hereby certify that service of the foregoing Brief for Respondents in printed form in Oposition to the Petition for Writ of Certiorari was had by mailing three copies, postage prepaid, to the Honorable Erwin N. Griswold, Solicitor General of the United States, U.S. Department of Justice, Washington, D.C. 20538, on the 15th day of November, 1971.

GEO. E. ALLEN

Relevant Constitutional and Statutory Provisions

28 U.S.C.A. § 1346(b) provides that the District Courts of the United States shall have jurisdiction of claims for damages for loss of property caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C.A. § 2680 excepts from the act any claim based upon the exercise or performance or failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government.

The Constitution of the United States, Amendment V, provides in part ". . . nor shall private property be taken for public use, without just compensation."

The Constitution of North Carolina, where this cause of action arose, provides, Art. I, § 17, "No person ought to be taken, imprisoned or disseized of his freehold, liberties or privileges or outlawed or exiled or in any manner deprived of his life, liberty or property, but by the law of the land."

The Bill of Rights, Art. I, § 35 of the Constitution of North Carolina declares:

> "All courts shall be open, and every person for injury done him in his lands, goods, person, or reputation, shall have remedy by due course of law and right and justice administered without sale, denial or delay."

The General Statutes of North Carolina, Vol. 2C Replacement 1965, § 63-11 provides:

> "Sovereignty in space above the lands and waters of this state is declared to rest in the State, except where granted to and assumed by the United States."

(This section was cited by the U.S. Supreme Court in the *Causby* case, page 1068 of 66 S.Ct.)

Section 63-12 of the North Carolina Statutes is as follows:

> "The ownership of the space above the lands and waters of this state is declared to be vested in the several owners of the surface beneath subject to the right of flight described in 63-13."

Section 63-13 provides:

> "Flight in aircraft over lands and waters of this state is lawful unless at such a low altitude as to interfere with the then existing use which the land or water, or space over the land or water, is put by the owner, or unless so conducted as to be injurious to the health and happiness, or eminently dangerous to persons or property lawfully on the land or water beneath."

(Section 63-13 of the North Carolina Statute was cited with approval in the *Causby* case, page 1068 of 66 S.Ct.)